

PHILLIP A. TALBERT  
United States Attorney  
STEPHANIE M. STOKMAN  
Assistant United States Attorney  
2500 Tulare Street, Suite 4401  
Fresno, CA 93721  
Telephone: (559) 497-4000  
Facsimile: (559) 497-4099  
Attorneys for Plaintiff  
United States of America

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.

WESLEY TSUKAMOTO,  
JASON AGUILAR,  
DARCY CALAFIORE,  
CESAR ESTEVAN RODRIGUEZ,  
HECTOR HERNANDEZ,  
RICK LEE HUTCHINSON,  
JASON BAILEY,  
  
Defendants.

CASE NO. 1:21-CR-00115-ADA-BAM

STIPULATION REGARDING EXCLUDABLE  
TIME PERIODS UNDER SPEEDY TRIAL ACT;  
FINDINGS AND ORDER

DATE: January 25, 2023

TIME: 1:00 p.m.

COURT: Hon. Barbara A. McAuliffe

This case is set for status conference on January 25, 2023. On May 13, 2020, this Court issued General Order 618, which suspends all jury trials in the Eastern District of California “until further notice.” Further, pursuant to General Order 611, this Court’s declaration of judicial emergency under 18 U.S.C. § 3174, and the Ninth Circuit Judicial Council’s Order of April 16, 2020 continuing this Court’s judicial emergency, this Court has allowed district judges to continue all criminal matters to a date after May 2, 2021.<sup>1</sup> This and previous General Orders, as well as the declarations of judicial emergency, were entered to address public health concerns related to COVID-19.

Although the General Orders and declarations of emergency address the district-wide health

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<sup>1</sup> A judge “may order case-by-case exceptions” at the discretion of that judge “or upon the request of counsel, after consultation with counsel and the Clerk of the Court to the extent such an order will impact court staff and operations.” General Order 618, ¶ 7 (E.D. Cal. May 13, 2020).

1 concern, the Supreme Court has emphasized that the Speedy Trial Act’s end-of-justice provision  
 2 “counteract[s] substantive openendedness with procedural strictness,” “demand[ing] on-the-record  
 3 findings” in a particular case. *Zedner v. United States*, 547 U.S. 489, 509 (2006). “[W]ithout on-the-  
 4 record findings, there can be no exclusion under” § 3161(h)(7)(A). *Id.* at 507. Moreover, any such  
 5 failure cannot be harmless. *Id.* at 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153  
 6 (9th Cir. 2000) (explaining that a judge ordering an ends-of-justice continuance must set forth explicit  
 7 findings on the record “either orally or in writing”).

8 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory  
 9 and inexcusable—General Orders 611, 612, 617, and 618 and the subsequent declaration of judicial  
 10 emergency require specific supplementation. Ends-of-justice continuances are excludable only if “the  
 11 judge granted such continuance on the basis of his findings that the ends of justice served by taking such  
 12 action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C.  
 13 § 3161(h)(7)(A). Moreover, no such period is excludable unless “the court sets forth, in the record of  
 14 the case, either orally or in writing, its reason or finding that the ends of justice served by the granting of  
 15 such continuance outweigh the best interests of the public and the defendant in a speedy trial.” *Id.*

16 The General Orders and declaration of judicial emergency exclude delay in the “ends of justice.”  
 17 18 U.S.C. § 3161(h)(7) (Local Code T4). Although the Speedy Trial Act does not directly address  
 18 continuances stemming from pandemics, natural disasters, or other emergencies, this Court has  
 19 discretion to order a continuance in such circumstances. For example, the Ninth Circuit affirmed a two-  
 20 week ends-of-justice continuance following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d  
 21 764 (9th Cir. 1981). The court recognized that the eruption made it impossible for the trial to proceed.  
 22 *Id.* at 767-68; *see also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to  
 23 exclude time following the September 11, 2001 terrorist attacks and the resultant public emergency).  
 24 The coronavirus is posing a similar, albeit more enduring, barrier to the prompt proceedings mandated  
 25 by the statutory rules.

26 In light of the societal context created by the foregoing, this Court should consider the following  
 27 case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-  
 28

justice exception, § 3161(h)(7) (Local Code T4).<sup>2</sup> If continued, this Court should designate a new date for the status conference. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must be “specifically limited in time”).

### STIPULATION

Plaintiff United States of America, by and through its counsel of record, and defendants, by and through defendants’ counsel of record, hereby stipulate as follows:

1. By previous order, this matter was set for status on January 25, 2023.

2. By this stipulation, defendants now move to continue the status conference until August 9, 2023, and to exclude time between January 25, 2023, and August 9, 2023, under 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4].

3. The parties agree and stipulate, and request that the Court find the following:

a) The government has represented that the discovery associated with this case includes reports, photographs, and audio files and is voluminous. This discovery has been either produced directly to counsel and/or made available for inspection and copying, and the production of or availability of more discovery is anticipated.

b) Counsel for defendants desire additional time to further review discovery, discuss potential resolution with defendants and the government, and investigate and prepare for trial.

c) Counsel for defendants believe that failure to grant the above-requested continuance would deny him/her the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

d) The government does not object to the continuance.

e) Based on the above-stated findings, the ends of justice served by continuing the case as requested outweigh the interest of the public and the defendant in a trial within the original date prescribed by the Speedy Trial Act.

f) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161, et seq., within which trial must commence, the time period of January 25, 2023 to August 9,

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<sup>2</sup> The parties note that General Order 612 acknowledges that a district judge may make “additional findings to support the exclusion” at the judge’s discretion. General Order 612, ¶ 5 (E.D. Cal. March 18, 2020).

2023, inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4] because it results from a continuance granted by the Court at defendant's request on the basis of the Court's finding that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

g) The parties also agree that this continuance is necessary for several reasons, including but not limited to, the need to permit time for the parties to exchange supplemental discovery, engage in plea negotiations, and for the defense to continue its investigation and preparation, pursuant to 18 U.S.C. § 3161(h)(7)(A) and 3161(h)(7)(B)(i) and (iv).

4. Nothing in this stipulation and order shall preclude a finding that other provisions of the Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial must commence.

IT IS SO STIPULATED.

Dated: January 17, 2023

PHILLIP A. TALBERT  
United States Attorney

/s/ STEPHANIE M. STOKMAN  
STEPHANIE M. STOKMAN  
Assistant United States Attorney

Dated: January 17, 2023

/s/ JOHN GARLAND  
JOHN GARLAND  
Counsel for Defendant  
WESLEY TSUKAMOTO

Dated: January 17, 2023

/s/ ROGER WILSON  
ROGER WILSON  
Counsel for Defendant  
JASON AGUILAR

Dated: January 17, 2023

/s/ KOJO MOORE  
KOJO MOORE  
Counsel for Defendant  
CESAR ESTEVAN  
RODRIGUEZ

1 Dated: January 17, 2023

/s/ DAVID BALAKIAN  
DAVID BALAKIAN  
Counsel for Defendant  
HECTOR HERNANDEZ

5 Dated: January 17, 2023

/s/ MICHAEL BERDINELLA  
MICHAEL BERDINELLA  
Counsel for Defendant  
DARCY CALAFIORE

8 Dated: January 17, 2023

/s/ RICHARD BESHWATE  
RICHARD BESHWATE  
Counsel for Defendant  
RICK LEE HUTCHINSON

12 Dated: January 17, 2023

/s/ JAMES HOMOLA  
JAMES HOMOLA  
Counsel for Defendant  
JASON BAILEY

16 **ORDER**

17 IT IS SO ORDERED that the status conference is continued from January 25, 2023, to **August 9,**  
18 **2023, at 1:00 p.m. before Magistrate Judge Barbara A. McAuliffe.** Time is excluded pursuant to 18  
19 U.S.C. § 3161(h)(7)(A), B(iv). The Court intends to set a trial date at the next status conference. If the  
20 parties do not resolve the case in advance of the next status conference, they shall be prepared to set a trial  
21 date at the status conference hearing.

22 IT IS SO ORDERED.

23 Dated: **January 19, 2023**

/s/ *Barbara A. McAuliffe*  
UNITED STATES MAGISTRATE JUDGE